



**Lee Construction Limited v Moseti (Employment and Labour Relations Appeal
E017 of 2023) [2024] KEELRC 2538 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2538 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E017 OF 2023
ON MAKAU, J
OCTOBER 18, 2024**

BETWEEN

LEE CONSTRUCTION LIMITED APPELLANT

AND

FRED NYANDUSI MOSETI RESPONDENT

*(Being an appeal against the Judgment and Decree of Hon. B.Mararo (MR) Senior
Principal Magistrate delivered on 26th September, 2023 in Nanyuki MCELRC
No.E003 of 2021)(Before Hon. Justice Onesmus Makau on 18th October, 2024)*

JUDGMENT

Introduction

1. This appeal arises out of an employment relationship between the parties herein. By a Memorandum of Claim dated 8th April 2021 the respondent sued the appellant in Lower Court alleging that the employer had constructively dismissed him from employment on 8th February 2021, and prayed for Kshs.770,000 made up of compensatory damages, salary in lieu of notice and unpaid salary.
2. The appellant denied liability and accused the respondent of absconding work after suspension by the letter dated 14th July 2020. On 8th February 2021, it decided to pay the respondent Kshs.92,479.60 being salary for July 2020, 18 leave days and service pay less PAYE, NSSF and NHIF. Therefore, it prayed for the suit to be dismissed with costs.
3. During the trial, the respondent testified as PW1. He adopted his written statement dated 8th August 2021 and produced 8 documents as exhibits. His evidence was that he joined the appellant on 21st May 2018 as a Purchase Assistant and worked until 13th July 2020 when he was served with a show cause letter. On 14th July 2020, he was suspended from work for two weeks. He never received any termination letter but he was not paid any salary until 8th February 2021 when he received a letter



indicating his final dues and a certificate of service. He was paid Kshs.92,479 through bank. In his view, he was constructively dismissed by the respondent and he suffered loss. He further stated that he signed the letter dated 8th February 2021 involuntarily. Therefore, he prayed for compensatory damages for unfair termination.

4. On cross examination, he stated that he never responded to the show cause letter dated 13th July 2020 since he was not given timelines and any paper. He also stated that he never resigned; he had no proof that he was on leave; and he was not served with any letter for absconding work.
5. DW1 was Francis Kigera Ngunjiri, appellant's Finance Manager. He adopted his written statement and his evidence. He stated that on 8th July 2020, together with Steve Njenga, the Finance Consultant went to Kisii for a site visit and upon audit of the assets, they found that the respondent had failed to remit Kshs.440,000 for machine hire and further failed to account for 1000 bricks valued Kshs.10,000. He contended that the respondent was first employed as Purchase Assistant but changed to Site Administrator.
6. DW2 was Wangechi Mwangi, Appellant's HR Manager. She adopted her written statement dated 8th July 2021 and produced 8 documents as defence exhibits. In brief, she testified that the appellant investigated a case of unremitted money from leasing of equipment in which the respondent was involved. The respondent was then called to a meeting attended by her and the Managing Director. Thereafter she issued him with a show cause letter and a suspension letter for two weeks. He was to report to the Head office on 27th July 2020 but he did not but he reached out after three months calling for salary arrears and final dues. The same was then paid in February 2021 and issued a certificate of service. She denied the alleged dismissal by the respondent.
7. On cross-examination, she admitted that the respondent was Purchase Assistant and that there was no evidence to prove that he was appointed as a Site Administrator. She further admitted that the suspension letter did not indicate the person to whom the respondent was to report but she confirmed that he never reported to her. She maintained that, respondent never reported back to work after the suspension period but he wrote messages asking for dues. She further admitted that she did not know how the messages she produced got to her computer, but confirmed that she printed them out as per the certificate filed. She contended that the messages originated from respondent's phone and by asking for final dues meant that he had left the employment.
8. After considering the evidence, the trial court (Hon.Mararo, SPM) concluded that the respondent had proved a case of constructive dismissal and entered judgment in his favour as prayed in the memorandum of claim. The appellant was aggrieved and filed the instant appeal urging this court to set aside the entire judgment of the trial court, and substitute it with an order dismissing the suit with costs.
9. The appeal stands on 8 grounds but in the written submissions, the appellant has framed the following issues for determination:
 - a. Whether the respondent reported back to work on 27th July 2020.
 - b. Whether the respondent made out a case of constructive dismissal.
 - c. Whether the respondent is entitled to salary from the month of August 2020 to 25th February 2021.
 - d. Whether the certificate of service dated 27th July 2020 was properly issued.
 - e. Whether the appeal is merited and the appellant entitled to the reliefs sought.



10. The appeal was canvassed by written submissions.

Appellant's submissions

11. On the 1st issue, it was submitted for the appellant that respondent to prove that he reported back from suspension on 27th July 2020 as required and therefore its evidence that he absconded work was not rebutted. It was argued that the respondent never called any witness to rebut the evidence of RW1 that he never reported back on 27th July 2020 as directed by the suspension letter dated 14th July 2020. It was further argued that the suspension letter was issued after the respondent admitted the offence of misappropriating the employer's money and requested for time to recover the same. However, he failed to report back after the two weeks suspension period and the effort to reach him failed. To buttress the case of absconding, the appellant relied on the case of Margaret Wanjiru Ndirangu & 4 others v Attorney General [2015] eKLR.
12. As regards the 2nd issue, it was submitted that the respondent did not prove constructive dismissal against it during the trial. Reliance was placed on Herbert Wafula Waswa v Kenya Wildlife Services [2020] eKLR and Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR where the courts discussed the ingredients of constructive dismissal.
13. In this case, it was submitted that the appellant did not conduct itself in a manner that entitled the respondent to leave employment without notice. It was argued that the respondent wilfully chose not to report back to work and sent text messages seeking his final dues. Further that the respondent did not discharge the burden of proof of repudiatory breach or constructive dismissal and as such the separation was mutual as between two parties herein. Consequently, it was submitted that the trial court erred in concluding that the appellant's conduct constituted elements of constructive dismissal.
14. It was further submitted that the respondent was not entitled to salary for the months of August 2020 to 25th February 2021 since the respondent was not working. Consequently, it was contended that the trial court erred in awarding the Kshs.250,000 as salary for the said 7 months. Further, reliance was place on the case of David Nyangoto Osiero v Radar Limited [2019] eKLR and Moses Gichuhi Gateru v Njucu Consolidated Company Limited [2019] eKLR to urge that the respondent was bound by a discharge agreement he signed after receiving his final dues amounting to Kshs.92,470.60.
15. As regards the certificate of service dated 27th July 2020, it was submitted that the same was properly and lawfully issued to the respondent since it indicates the date when the employment commenced and ended as required by section 51 of the *Employment Act, 2007*. It was submitted that dating the certificate of service to 27th July 2020 was proper because it reflected the date when the respondent stopped working with the appellant.
16. In view of the foregoing matters, it was submitted that the appeal is merited and the appellant is entitled to the reliefs sought. It was submitted that the constructive dismissal was not proved, that the claimant never worked after 27th July 2020, and that he was estopped from filing the suit by virtue of the discharge signed on 8th February 2021. Consequently, the court was urged to allow the appeal as prayed.

Respondent's submission

17. It was submitted for the respondent that by the suspension letter dated 14th July 2020 the respondent was directed not to access his work station but should report to the Head office on 27th July 2020. He complied with the instructions and then he was referred to Nyamira.



18. It was further submitted that the respondent was not notified that he would be dismissed for absconding duties nor has any evidence been adduced to demonstrate any steps the appellant took to warn him that he would be dismissed if he did not report to work. Reliance was placed on *Milano Electronics v Dickson Nyasi Muhaso* [2021] eKLR where the court upheld the principle that an employer is required to inform the employee before dismissing him on account of absconding duties.
19. It was further submitted that although the appellant pleaded that the respondent absconded work, it submitted herein that the respondent's employment was terminated by mutual consent. It was however submitted for the respondent that he was constructively dismissed because; -
 - a. His contract terms were unilaterally altered contrary to section 10 (5) of the *Employment Act*.
 - b. The appellant stopped remitting NSSF and NHIF for the respondent from August 2020 after he was directed to report to the Head office on 27th July 2020 and therefore told verbally to report to Nyamira County without being assigned any duties.
 - c. No disciplinary process was initiated against the respondent despite the allegation that he absented himself from work.
20. It was submitted that constructive dismissal connotes actions or inactions on the part of the employer which drive an employee to leave employment or resign. For emphasis, reliance was placed on *Ahmed Salim Bahannan v Foton East Africa* [2016] eKLR, *James Angawa Atanda & 10 others v Judicial Service Commission* [2017] eKLR and *Western Excavation (ECC) Limited v Share* [1678] 1 CR or [1978] QB 761.
21. In view of the foregoing submission, it was submitted that the respondent is entitled to the reliefs granted by the trial court.

Analysis

22. This being a first appeal, the court's mandate is to re-evaluate the evidence on record and make his own conclusions taking into account the fact that it did not see the witnesses when they testified. I am guided by the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 where the court held thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
23. I have considered the evidence on record and the submissions made in this appeal. The issues for determination therefore are:
 - a. Whether the respondent was constructively dismissed or he absconded work.
 - b. If he was dismissed, whether the same was unfair and unlawful.
 - c. Whether or not the impugned judgment should stand.



Constructive dismissal or absconding

24. Constructive dismissal is not provided in our statute laws but it is a term that has been imported by our courts from abroad. The Black's Law Dictionary 10th Edition defines constructive dismissal or discharge as follows: -

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

25. In the case of Coca Cola East & Central Africa Ltd v Maina Kagai Ligaga [2015] eKLR the Court of Appeal held: -

“The Key elements in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitlement to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay – this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment -this is the contractual test.”

26. On the other hand, absconding refers to the situation where an employee secretly leaves employment or absents himself from work with no intention of reporting back. It is a breach of contract by an employee that terminates an employment contract.

27. The question that arises is whether or not the evidence on record supports the alleged constructive dismissal or absconding. In his testimony, the respondent stated that he was suspended by a letter dated 14th July 2020 with instruction to report at Head office on 27th July 2020; that he reported to the Head office as instructed and he was verbally instructed to report to Nyamira County with no duties assigned to him; that his NHIF and NSSF deductions were not remitted from August 2020; and that he was never warned by the employer of absconding duties until February 2021 when he was paid terminal dues; and that was issued with a certificate of service backdated to 27th July 2021. In his view, he was constructively dismissed.

28. The appellant, on the other hand, contends that the respondent was suspended by a letter dated 14th July 2020 due to misconduct but he never reported back to the Head office on 27th July 2020 as instructed vide the suspension letter. It denied the alleged dismissal of the respondent. It produced SMS Texts to prove that the respondent absconded work and demanded terminal dues.

29. I have carefully considered the evidence on record and confirmed that the respondent was suspended for gross misconduct vide letter dated 14th July 2020 and he was issued with a show cause letter dated 13th July 2020. The suspension letter stated that: -

“Dear sir

Re: Suspension

We refer to your meeting yesterday with the Managing Director and the undersigned and the show cause letter issued thereafter and your subsequent response. We write to confirm



that you will be suspended from your duties for two weeks. You are required to recover the misappropriated monies during this period.

You are further barred from accessing your work station during this duration and required to report to the Head office on 27th July 2020.

Yours faithfully

Lee Construction Limited

Wangechi Mwangi

Human Resource Consultant

Cc: Managing Director

Finance Consultant”

30. The above letter is clear that the respondent was suspended for two weeks and then report to the Head office on 27th July 2020. Although the letter did not state, to which office at the Head office the respondent was to report, he should at least have reported to the HR Consultant who wrote the suspension letter or the Managing Director or the Finance consultant who were copied the said letter.
31. The respondent alleged that he reported to the Head office and he was verbally referred to Nyamira with no written assignment. He did not name the person he met at the Head office on 27th July 2020 or the person who referred him to Nyamira.
32. The only reasonable conclusion to draw from the foregoing gap in his evidence is that the respondent never reported back to the Head office on 27th July 2020 as directed vide the suspension letter. He defied the command by the HR Consultant who is a person placed in authority by the employer to issue such command to him. He disobeyed the lawful command by absconding from work from 27th July 2020. Consequently, I find that the alleged constructive dismissal did not occur and hold that the respondent voluntarily absconded work to evade disciplinary process.
33. In view of the foregoing conclusion, I find that the trial court erred in holding that the respondent had proved a case of constructive dismissal when there was no iota evidence to support the same. The trial court based his conclusion on the fact that the appellant stopped paying salary to the respondent and further stopped remitting statutory deductions from August 2020. I see nothing wrong with the employer stopping salary of an absconding employee. Needless to say, once salary is stopped no statutory deductions are available for remittance to the concerned government Agencies.
34. Having said that, I find and hold that the appeal has merits and it is allowed as prayed. Consequently, the judgment rendered by the lower court on 26th September 2023 is hereby set aside and substituted with an order dismissing the respondent’s suit with costs. The appellant is also awarded costs of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 18TH DAY OF OCTOBER, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



ONESMUS N MAKAU
JUDGE

